

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

Albert Dinkins, #155371, <i>aka</i> Albert Alexander Dinkins,	)	C/A No. 6:07-528-CMC-WMC
	)	
	)	
Petitioner,	)	<b>Report and Recommendation</b>
	)	
vs.	)	
	)	
Stan Burt,	)	
	)	
Respondent.	)	
	)	

The petitioner, Albert Dinkins (“Petitioner”), proceeding *pro se*, brings this action pursuant to 28 U.S.C. § 2254 for habeas relief.<sup>1</sup> He was convicted and sentenced in State court in 1993. Petitioner is an inmate at Lieber Correctional Institution, a facility of the South Carolina Department of Corrections (SCDC), and files this action *in forma pauperis* under 28 U.S.C. § 1915. This Court has previously adjudicated a petition for writ of habeas corpus filed by the Petitioner pursuant to § 2254. In Civil Action Number 6:97-3746-CMC-WMC, this Court dismissed petitioner’s § 2254 petition and granted the respondent’s motion for summary judgement. The dismissal of Petitioner’s § 2254 action was affirmed on appeal to the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”). Petitioner has not received permission from the Fourth Circuit to file a second or successive § 2254 petition. The petition should be dismissed as this Court does not have jurisdiction to consider it.

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<sup>1</sup> Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., the undersigned is authorized to review such petitions for relief and submit findings and recommendations to the District Court.

Under established local procedure in this judicial district, a careful review has been made of the *pro se* petition filed in this case. The review was conducted pursuant to the procedural provisions of the Rules Governing Habeas Corpus Cases Under Section 2254 and the Anti-Terrorism and Effective Death Penalty Act of 1996, and in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951 (4<sup>th</sup> Cir. 1995); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Boyce v. Alizaduh*, 595 F.2d 948 (4th Cir. 1979). This Court is required to construe *pro se* petitions liberally. Such *pro se* petitions are held to a less stringent standard than those drafted by attorneys, see *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir.1978), and a federal district court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Cruz v. Beto*, 405 U.S. 319 (1972). Even under this less stringent standard, however, the petition submitted in the above-captioned case is subject to summary dismissal. The requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. See *Weller v. Department of Social Servs.*, 901 F.2d 387 (4th Cir. 1990).

### **Background**

Petitioner was convicted by a jury on June 25, 1993, and sentenced to life with thirty (30) and ten (10) year consecutive sentences. Petitioner's conviction was affirmed on direct appeal on July 24, 1995. Petitioner filed for post-conviction relief (PCR) in State

court, which was denied on August 14, 1996. Petitioner filed a petition for habeas relief in this Court on December 5, 1997, which was denied on July 10, 1998, and affirmed on appeal to the Court of Appeals for the Fourth Circuit on November 10, 1998. Subsequently, Petitioner filed a second PCR action in State court, which was denied December 18, 2003. The petition indicates Petitioner appealed both PCR actions to the State's highest court, which is a prerequisite to filing an action for habeas relief in a federal district court.

### **Discussion**

The present petition is the second § 2254 petition filed by Petitioner in this Court with respect to his State convictions.<sup>2</sup> Petitioner's first § 2254 petition, filed on December 5, 1997, was dismissed and the dismissal was affirmed on appeal to the Fourth Circuit. The present petition must also be dismissed. Chapter 153 of Title 28 of the United States Code "provides a statutory framework for federal post conviction relief from judgments of conviction entered in federal and state courts. Under this framework, individuals convicted of crimes in state courts seek federal habeas corpus relief through 28 U.S.C. § 2254." *In re Vial*, 115 F.3d 1192, 1194 (4<sup>th</sup> Cir. 1997) (footnote omitted). On April 24, 1996, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA") which, in part, amended Chapter 153.

The AEDPA effected a number of substantial changes regarding the availability of federal postconviction relief to individuals convicted of crimes in federal and state courts. Of particular importance here are the provisions

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<sup>2</sup> The Court may take judicial notice of proceedings had before it in a prior suit with the same parties. *Mann v. Peoples First Nat. Bank & Trust Co.*, 209 F.2d 570, 572 (4<sup>th</sup> Cir. 1954); *see also Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4<sup>th</sup> Cir. 1989) ("[t]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records.").

of the AEDPA codifying and extending judicially constructed limits on the consideration of second and successive applications for collateral relief. See *Felker v. Turpin*, 518 U.S. 651, [657] (1996). Under the AEDPA, an individual may not file a second or successive § 2254 petition for a writ of habeas corpus or § 2255 motion to vacate sentence without first receiving permission to do so from the appropriate circuit court of appeals.

*In re Vial*, 115 F.3d at 1194 (footnote omitted).

The "gatekeeping" mechanism created by the AEDPA amended § 2244(b) to provide:

The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court. § 2244(b)(3)(A). A three-judge panel has 30 days to determine whether "the application makes a prima facie showing that the application satisfies the requirements of" § 2244(b). § 2244(b)(3)(C); see §§ 2244(b)(3)(B), (D).

*Felker v. Turpin*, 518 U.S. 651, 657 (1996).

In order for this Court to consider a second or successive § 2254 petition, Petitioner must obtain a Pre-Filing Authorization from the United States Court of Appeals for the Fourth Circuit under 28 U.S.C. § 2244(b)(3). Petitioner can obtain the necessary forms from the Clerk's Office of the United States Court of Appeals for the Fourth Circuit. Because Petitioner did not obtain authorization from the Fourth Circuit to file his petition in this district court, this Court does not have jurisdiction to consider it.

### **Recommendation**

Accordingly, it is recommended that the petition for a writ of habeas corpus in this case be dismissed *without prejudice* and without service upon the respondents. See *Toney v. Gammon*, 79 F.3d 693, 697 (8<sup>th</sup> Cir. 1996) (a petition may be summarily dismissed if the record clearly indicates that Petitioner's claims are either barred from

review or without merit); *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (federal district courts have duty to screen habeas corpus petitions and eliminate burden placed on respondents caused by ordering an unnecessary answer or return).

s/William M. Catoe  
United States Magistrate Judge

May 4, 2007  
Greenville, South Carolina

**Petitioner's attention is directed to the important notice on the next page.**

### **Notice of Right to File Objections to Report and Recommendation**

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Court Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. In the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must “only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4<sup>th</sup> Cir. 2005).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk  
United States District Court  
P. O. Box 10768  
Greenville, South Carolina 29603

**Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation.** 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985).